(8)

No. 03-388

Supreme Court, U.S.
FILED
SEP 13 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DENNIS BATES, ET AL.,

Petitioners,

v.

DOW AGROSCIENCES LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE WESTERN PEANUT GROWERS ASSOCIATION, CORN PRODUCERS ASSOCIATION OF TEXAS, TEXAS PEANUT PRODUCERS BOARD, AND EVERGREEN FARMS IN SUPPORT OF PETITIONERS

DAVID T. GOLDBERG
99 Hudson St., 8th Fl.
New York, N.Y. 10013
(212) 334-8813

SEAN H. DONAHUE
Counsel of Record
1477 A St., N.E.
Washington D.C. 20002
(202) 277-7085

Counsel for Amici Curiae

September 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
CONGRESS DID NOT INTEND TO PREEMPT COMMON LAW DAMAGE ACTIONS IN ENACTING 7 U.S.C. § 136v(b)	5
A. When Congress Enacted Section 136v(b), Common Law Damages Actions Challenging the Adequacy of Warnings and Label Statements Made by Pesticide Manufacturers Were Widely Available Notwithstanding Extensive Pesticide Labeling Requirements	5
1. At the time of the enactment of the 1972 Act, common law damages actions against pesticide manufacturers were widely available and uncontroversial	6
2. Before 1972, state and federal governments imposed extensive regulations on the content of pesticide labels	9
3. At the time of the enactment of the 1972 Act, Federal and state labeling requirements were not understood to preempt damages actions	11

TABLE OF CONTENTS—Continued

	Page
B. The Legislative History of the 1972 Act Demonstrates that Section 136v(b) Is Directed Solely at the Continued Regulatory Authority of State Agencies in Light of the Expansion of Federal Power....	13
1. The legislative history of the 1972 Act is devoid of any suggestion of an intent to preempt common law damages actions.....	14
2. Section 136v is directed solely at the continuing regulatory authority of state agencies	20
a. The committee hearings.....	22
b. The development of Section 136v in the House and Senate.....	26
c. Discussion of Section 136v in the House and Senate Committee Reports.....	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Bean v. Diamond Alkali Co., 454 P.2d 69 (Idaho 1969).....	8
Boyl v. California Chemical Co., 221 F. Supp. 669 (D. Or. 1963)	7
Branco Eastern Co. v. Leffler, 482 P.2d 364 (Colo. 1971).....	8
Burr v. Sherwin Williams Co., 268 P.2d 1041 (Cal. 1954).....	8
Cannon v. University of Chicago, 441 U.S. 667 (1979).....	5
Chapman Chemical Co. v. Taylor, 222 S.W.2d 820 (Ark. 1949)	7, 8
Cippolone v. Liggett Group, Inc., 505 U.S. 504 (1992).....	2
Corprew v. Geigy Chemical Corp., 157 S.E.2d 98 (N.C. 1967).....	8
Daniels v. Atlantic Refining Co., 295 F. Supp. 125 (D. Del. 1968).....	7
Diamond Alkali Co. v. Godwin, 112 S.E.2d 365 (Ga. Ct. App. 1959)	8
Dobias v. Western Farmers Assn., 491 P.2d 1346 (Wash. Ct. App. 1971).....	8
Dole v. Dow Chem. Co., 316 N.Y.S.2d 348 (N.Y. Sup. Ct. 1970).....	7
Ducote v. Chevron Chemical Co., 227 So. 2d 601 (La. Ct. App. 1969).....	8
E.I. Du Pont de Nemours & Co. v. Baridon, 73 F.2d 26 (8th Cir. 1934)	7
Eaton Fruit Co. v. California Spray-Chemical Corp., 445 P.2d 437 (Ariz. 1968).....	8
Ebers v. General Chemical Co., 17 N.W.2d 176 (Mich. 1945).....	7, 8, 12

TABLE OF AUTHORITIES—Continued

	Page
Edwards v. California Chemical Co., 245 So. 2d 259 (Fla. Ct. App. 1971)	7
Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp., 403 P.2d 351 (Wash. 1965)	7
Gonzalez v. Virginia-Carolina Chemical Co., 239 F. Supp. 567 (D. S.C. 1965)	7, 8, 12
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	5
Great Western Oil Co. v. Kraus, 122 N.E. 12 (Ind. Ct. App. 1919)	8
Grey v. Hayes-Sammons Chemical Co., 310 F.2d 291 (5th Cir. 1962)	8
Griffin v. Planters Chem. Corp., 302 F. Supp. 937 (D.S.C. 1969)	7, 12
Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965)	7, 12
Ingraham v. Assoc. Oil Co., 6 P.2d 645 (Wash. 1932)	8
Jones v. George, 61 Tex. 345 (1884)	6
La Plant v. E.I. Du Pont de Nemours & Co., 346 S.W.2d 231 (Mo. Ct. App. 1961)	8
Larance v. FMC Corp., 192 So. 2d 628 (La. App. Ct. 1966)	7
Lee v. Madigan, 358 U.S. 228 (1959)	2
McClanhan v. California Spray-Chem Corp., 75 S.E.2d 712 (Va. 1953)	7, 12
McCrossin v. Noyes Bros. & Cutler, 173 N.W. 566 (Minn. 1919)	7
McQuaide v. Bridgeport Brass Co., 190 F. Supp. 252 (D. Conn. 1960)	8
Medtronic v. Lohr, 518 U.S. 470 (1996)	2
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)	5

TABLE OF AUTHORITIES—Continued

	Page
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)	5
Mossrud v. Lee, 157 N.W. 758 (Wisc. 1916)	7
Muncy v. Magnolia Chem. Co., 437 S.W.2d 15 (Tex. Ct. App. 1968)	7
Norfolk Redevelopment and Housing Auth. v. Chesepeake & Potomac Tel. Co., 464 U.S. 30 (1983)	5
Orr v. Shell Oil Co., 177 S.W.2d 608 (Mo. 1943)	7
Patterson v. Orangeburg Fertilizer Co., 108 S.E. 401 (S.C. 1921)	8
Perry Creek Cranberry Corp. v. Hopkins Ag. Chem. Co., 139 N.W.2d 96 (Wisc. 1966)	8, 12
Reasor-Hill Corp. v. Kennedy, 272 S.W.2d 685 (Ark. 1954)	7, 8
Rose v. Buffalo Air Serv., 104 N.W.2d 431 (Neb. 1960)	7
Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387 (Tex. Ct. App. 1968)	7, 12
Sawan, Inc. v. American Cyanamid Co., 88 S.E.2d 152 (Ga. 1955)	8
Simpson v. American Oil Co., 8 S.E.2d 813 (N.C. 1940)	8
Smith v. Atco Co., 94 N.W.2d 697 (Wis. 1959)	8
Stiltjes v. Ridco Exterminating Co., 347 S.E.2d 568 (Ga. 1986)	7
Streich v. Hilton-Davis, 692 P.2d 440 (Mont. 1984)	7
Swift & Co. v. Bennett, 373 S.W.2d 569 (Tex. Civ. App. 1963)	8
Swift & Co. v. Phillips, 314 S.W.2d 326 (Tex. Civ. App. 1958)	7

TABLE OF AUTHORITIES—Continued

	Page
Udell v. Rohm & Haas Co., 392 P.2d 225 (Wash. 1964)	8
United States v. Texas, 507 U.S. 529 (1993)	5
Van Antwerp-Aldridge Drug Co. v. Schwartz, 82 So. 2d 209 (Ala. 1955)	8
Wasatch Chemical Co. v. Leon, 259 P.2d 301 (Utah 1953)	8
Weber v. Fidelity & Casualty Ins. Co., 250 So. 2d 754 (La. 1971)	7, 8
West Disinfecting Co. v. Plummer, 44 App. D.C. 345 (D.C. Cir. 1916)	7
White v. National Bank of Commerce, 278 P. 915 (Cal. D. Ct. App. 1929)	7
Wise v. Hayes, 361 P.2d 171 (Wash. 1961)	8

STATUTES

Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 61 Stat. 163	2, 9
Insecticide Act of 1910, ch. 191, 36 Stat. 331	9
7 U.S.C. § 136m	15, 17
7 U.S.C. § 136v	*passim*
7 U.S.C. § 135(z) (repealed)	9
7 U.S.C. § 135b (repealed)	2, 9

REGULATIONS

7 C.F.R. § 162.6 (1949)	10
7 C.F.R. § 162.7 (1949)	10
7 C.F.R. § 162.9 (1949)	10
7 C.F.R. §§ 162.102-105 (1949)	10
7 C.F.R. § 162.103 (1949)	10
7 C.F.R. § 162.112 (1949)	10
7 C.F.R. § 162.114 (1949)	10
40 C.F.R. § 162.153(e)	3

TABLE OF AUTHORITIES—Continued

	Page
Cal. Admin. Code tit. 3 §§ 6235-6243	3
La. Admin. Code. tit. 7, pt XXIII § 117	3
333 Mass. Admin. Code § 8.04	3
7 Pa. Admin. Code § 128.92	3
Wash. Admin. Code, § 16-228-1400	4

LEGISLATIVE HISTORY MATERIALS

Federal Environmental Pesticide Control Act: Hearings Before the Subcomm. on Ag. Research of the Sen. Comm. on Ag. and Forestry, 92d Cong., 1st Sess. (1971)	*passim*
Federal Environmental Pesticide Control Act: Hearings Before the Subcomm. on Ag. Research of the Sen. Comm. on Ag. and Forestry, 92d Cong., 2d Sess. (1972)	*passim*
Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on the Environment of the Sen. Comm. on Commerce, 92d Sess., 2d Sess. (1972)	11, 13, 16, 19
Federal Pesticide Control Act of 1971: Hearings Before the House Comm. on Ag., 92d Cong., 1st Sess. (1971)	*passim*
H.R. 4152, 92d Cong., 1st Sess. (introduced Feb. 10, 1971)	22
H.R. Conf. Rep. No. 1540, 92d Cong., 2d Sess. (1972)	13, 21, 28
H.R. Rep. No. 313 (1947)	11
H.R. Rep. No. 511, 92d Cong., 1st Sess. (1971)	*passim*
S. Rep. No. 838, 92d Cong., 2d Sess. (1972)	*passim*
S. Rep. No. 838 (Supplemental Report), 92d Cong., 2d Sess. (1972)	13, 21
S. Rep. No. 970, 92d Cong., 2d Sess. (1972)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
117 Cong. Rec. H10674-H10680 (Daily Edition, Nov. 8, 1971)	13
117 Cong. Rec. H10726-H10774 (Daily Edition, Nov. 9, 1971)	13, 15, 21, 27
118 Cong. Rec. S15885-S15900 (Daily Edition, Sept. 26, 1972)	13, 19, 21
118 Cong. Rec. S16977-S16981 (Daily Edition, Oct. 5, 1972)	13, 21
118 Cong. Rec. H9184 (Daily Edition, Oct. 5, 1972)	21
118 Cong. Rec. H9795-H9798 (Daily Edition, Oct. 12, 1972)	13, 19
MISCELLANEOUS	
Annotation, *Liability of Manufacturer or Seller for Injury Caused by Animal Feed or Medicines, Crop Sprays, Fertilizers, Insecticides, Rodenticides, and Similar Products*, 81 A.L.R. 2d 138 (1962)	9
Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. 853 (1992)	6
Donald Stever, 1 Law of Chemical Reg. and Hazardous Waste (2004)	4

STATEMENT OF INTEREST*

The Western Peanut Growers Association is a nonprofit trade association representing approximately 1,000 peanut growers in legislative and public policy matters. The Texas Peanut Producers Board is the oldest commodity board in Texas, representing the interests of peanut producers in improving peanut quality and improving the profitability of peanut production. The Corn Producers Association of Texas is a nonprofit trade group representing approximately 250 corn producers, committed to increasing the profitability of corn production through education, promotion, research, and marketing. Evergreen Farms is a vegetable and pecan farm operated by Howard Ivy.

These *amici* represent farmers who purchase and use pesticides and other agricultural chemicals. They have a strong interest in the question presented by this case, as their ability to recover for injuries they may suffer as a result of using pesticides may depend on the preemptive effect of 7 U.S.C. § 136v(b). As we demonstrate below, by the time the statute was enacted in 1972, farmers and others injured by pesticides had for decades maintained actions against pesticide manufacturers under theories of breach of duty to warn, failure to perform as advertised, breach of warranty, strict liability, and other common law theories. Nothing in the statutory text or the voluminous legislative history suggests than Congress intended to deprive them of their long-established common-law remedies.

---

* Pursuant to Rule 37.6, *amici* state that no counsel for any party authored any part of this brief. No person or entity, other than *amici*, made a monetary contribution toward the preparation or submission of this brief, which is filed with the parties' written blanket consent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue presented by this case is whether Congress intended to extinguish damages actions under state common law by prohibiting the states from imposing pesticide labeling "requirements," as that term is used in Section 24(b) of the Federal Environmental Pesticide Control Act of 1972 ("1972 Act"), codified at 7 U.S.C. § 136v(b). In *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Medtronic v. Lohr*, 518 U.S. 470 (1996), this Court interpreted two different federal statutes that prohibit states from imposing certain types of "requirements," and reached differing conclusions as to whether those prohibitions encompass common law damages actions. Although *Cippolone* and *Medtronic* construe the term "requirements" differently, the cases teach the same lesson: the meaning of the term "requirements" must be inferred from its statutory context. "Only mischief" can result from giving terms in different statutes "one meaning regardless of the statutory context." *Lee v. Madigan*, 358 U.S. 228, 231 (1959).

An examination of the statutory context of Section 136v(b) reveals that Congress had no intention in enacting the 1972 Act to preempt any common law damage remedies. Section 136v is addressed to a question very different from the continued availability of tort remedies: the scope of state agencies' authority to regulate pesticides in light of the expansion of federal authority carried out in the 1972 Act. Under the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 61 Stat. 163 ("1947 Act"), the federal government had regulated the content of labels of pesticides that traveled in interstate commerce by requiring that such pesticides be registered with the Department of Agriculture, a process that required federal approval of the form and content of pesticide labels, but pre-1972 federal law did not require registration for pesticides that moved only in intrastate commerce, nor did it directly regulate the use of any

pesticides.[1] These subjects were within the purview of state agencies, which had established a variety of regulatory schemes governing pesticide uses and which also required registration and approval of labels for pesticides formulated for in-state use.[2] In the 1972 Act, the federal government moved into these areas previously regulated by state agencies, raising the question of what regulatory authority state administrative agencies retained.

Section 24 of the 1972 Act, codified at Section 136v, represents Congress's principal effort to answer that question. Subsection (a) of that provision, aptly entitled, "In general," establishes the general rule that state agencies "may regulate" the uses of pesticide to the extent such regulation is stricter than that imposed by EPA. Subsection (b) is entitled "Uniformity" because it addresses the interest in allowing pesticide manufacturers to market pesticides nationally bearing a single uniform label. It establishes an exception to the general rule—"such states," *i.e.*, those which regulate the *use* of pesticides, may not impose labeling "requirements" different from those mandated by EPA. Subsection (c), in turn, provides that, notwithstanding the general prohibition on state-imposed labeling requirements, a state may require registration of pesticides formulated for use within that state to allow "additional uses" of the pesticides not approved by the federal government to "meet special local needs." Under subsection (c), states may approve supplemental labels giving instructions and warnings regarding these additional uses,

---

[1] *See* 7 U.S.C. § 135b (repealed); S. Rep. No. 838, 92d Cong., 2d Sess. (1972) ["Sen. Ag. Comm. Report"] at 4 ("[T]here is no prohibition at present against the misuse of a registered pesticide. There is also no control under the Act for pesticides distributed within a single state.").

[2] *See* Federal Pesticide Control Act of 1971: Hearings Before the House Comm. on Ag., 92d Cong., 1st Sess. (1971) ["House Comm. Hearing"] at 21-22 (table of state pesticide laws).

and, in doing so, states impose regulatory requirements regarding the form and content of those labels.[3]

Section 136v(b) cannot be construed to eliminate existing common law damages remedies because there is no basis for believing that Congress even *considered* doing so (let alone *intended* to do so). At the time of the enactment of the 1972 Act, common law damages actions against pesticide manufacturers sounding in tort were a commonplace and uncontroversial feature of the legal landscape, and hundreds of cases had been decided involving claims that instructions and warnings provided by pesticide companies were inadequate, misleading, or false, and allegations that a pesticide failed to live up to claims made on a pesticide label. Although state and federal statutes had long imposed substantial pesticide labeling requirements, these requirements were not understood to conflict in any way with the availability of common law damages actions against pesticide manufacturers based on their failure to warn, fraudulent misrepresentations, or other tortious conduct.

The conclusion that Section 136v(b) is addressed exclusively to the respective authority of state and federal administrative agencies, and not the availability of common law damages actions, is overwhelmingly demonstrated by the legislative history of the 1972 Act. All the testimony, debates, and discussions over what became Section 136v(b) address the ongoing regulatory authority of the state pesticide agencies. In contrast, in 2300 pages of committee hearing transcripts regarding the 1972 Act, four committee reports, a conference committee report, and five days of debate on the

[3] *See* 40 C.F.R. § 162.153(e). For examples of state labeling requirements, *see, e.g.*, Cal. Admin. Code tit. 3, § 6235-6243; La. Admin Code. tit. 7, pt. XXIII, § 117; 7 Pa. Admin. Code § 128.92; 333 Mass. Admin. Code § 8.04; Wash. Admin. Code § 16-228-1400. *See generally* Donald Stever, 1 Law of Chemical Reg. and Hazardous Waste §§ 3:46-3:48 (2004).

floor of the House and Senate, there is absolutely *no* discussion of extinguishing common law damages remedies. Congress should not be deemed to have wiped out, without ever having considered the question, a body of important remedies that had long been available to persons injured by pesticides.

ARGUMENT

CONGRESS DID NOT INTEND TO PREEMPT COMMON LAW DAMAGE ACTIONS IN ENACTING 7 U.S.C. § 136v(b)

A. When Congress Enacted Section 136v(b), Common Law Damages Actions Challenging the Adequacy of Warnings and Label Statements Made By Pesticide Manufacturers Were Widely Available Notwithstanding Extensive Pesticide Labeling Requirements

In order to understand the changes made (and not made) in pesticide regulation through the 1972 Act, it is important to understand the state of the law as it existed in 1972, as it must be "presume[d] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). *See also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Cannon v. University of Chicago*, 441 U.S. 667, 698-99 (1979). The 1972 Act should be read to alter existing law, including the availability of common law damages actions, only if there is substantial reason to believe that Congress intended that result. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993) (discussing the "longstanding . . . principle" that "statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles"); *Norfolk Redevelopment and Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) (common-law doctrines "'ought not to be deemed repealed, unless the language of the statute be clear

and explicit for this purpose.' ") (quoting *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603, 623 (1812)); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (statute must "speak directly" to abrogate common law principle). "[T]his presumption favoring retention of existing law" is particularly appropriate where, as here, the settled law in question is *state* common law. *United States v. Texas*, 507 U.S. at 543 (citing *Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981)).

1. *At the time of the enactment of the 1972 Act, common law damages actions against pesticide manufacturers were widely available and uncontroversial*

To construe Section 136v(b), as did the court of appeals, as preempting any state common law damages action that touches on the adequacy or inadequacy of statements made on pesticide labels (not to mention those which might operate indirectly, to "induce" manufacturers to alter their labels), would eliminate a large and settled body of law. Since the late nineteenth century, common law damages actions have been available to those injured by ineffectual or harmful pesticides.[4] In 1884, a farmer brought an action against the seller of "Royall's Patent or Receipt for Killing Worms," which had been represented as effective against cotton worms but which plaintiff allegedly had failed to control them.[5] Since then, pesticide manufacturers were held to answer under familiar tort theories for failure to warn of the potential harms to crops

[4] The issue here differs from that in *Cippolone*, which addressed whether Congress intended to preempt tort actions against cigarette manufacturers. When the statutes involved in *Cippolone* were adopted, there had been almost no history of common law actions against cigarette manufacturers. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. 853 (1992).

[5] *Jones v. George*, 61 Tex. 345 (1884).

and farm animals resulting from use of their products,[6] and for personal injuries resulting from use of their products.[7]

In addition to actions for failure to warn, pesticide manufacturers were long subject to suit on a variety of other common law theories when their products failed to perform as advertised or otherwise caused injury. Manufacturers thus were held to a standard of strict liability for manufacturing products that failed to perform as advertised.[8] They also faced liability for negligence in formulating products that

[6] *See, e.g., E.I. Du Pont de Nemours & Co. v. Baridon*, 73 F.2d 26 (8th Cir. 1934); *Reasor-Hill Corp. v. Kennedy*, 272 S.W.2d 685 (Ark. 1954); *White v. National Bank of Comm.*, 278 P. 915 (Cal. D. Ct. App. 1929); *Daniels v. Atlantic Refining Co.*, 295 F. Supp. 125 (D. Del. 1968); *Larance v. FMC Corp.*, 192 So. 2d 628 (La. App. Ct. 1966); *Ebers v. General Chem. Co.*, 17 N.W.2d 176 (Mich. 1945); *Streich v. Hilton-Davis*, 692 P.2d 440 (Mont. 1984); *Dole v. Dow Chem. Co.*, 316 N.Y.S.2d 348 (N.Y. Sup. Ct. 1970); *Swift & Co. v. Phillips*, 314 S.W.2d 326 (Tex. Civ. App. 1958); *McClanhan v. Cal. Spray-Chem Corp.*, 75 S.E.2d 712 (Va. 1953); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 403 P.2d 351 (Wash. 1965).

[7] *See, e.g., Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965); *West Disinfecting Co. v. Plummer*, 44 App. D.C. 345 (D.C. Cir. 1916); *Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937 (D.S.C. 1969); *Gonzalez v. Virginia-Carolina Chemical Co.*, 239 F. Supp. 567 (D. S.C. 1965); *Boyl v. California Chemical Co.*, 221 F. Supp. 669 (D. Or. 1963); *Edwards v. California Chemical Co.*, 245 So. 2d 259 (Fla. Ct. App. 1971); *Weber v. Fidelity & Casualty Ins. Co.*, 250 So. 2d 754 (La. 1971); *McCrossin v. Noyes Bros. & Cutler*, 173 N.W. 566 (Minn. 1919); *Orr v. Shell Oil Co.*, 177 S.W.2d 608 (Mo. 1943); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15 (Tex. Ct. App. 1968); *Rumsey v. Freeway Manor Minimax*, 423 S.W.2d 387 (Tex. Ct. App. 1968); *Mossrud v. Lee*, 157 N.W. 758 (Wisc. 1916).

[8] *See, e.g., Chapman Chemical Co. v. Taylor*, 222 S.W.2d 820 (Ark. 1949); *Stiltjes v. Ridco Exterminating Co.*, 347 S.E.2d 568 (Ga. 1986); *Streich v. Hilton-Davis*, 692 P.2d 440 (Mont. 1984); *Rose v. Buffalo Air Serv.*, 104 N.W.2d 431 (Neb. 1960).

caused personal injuries or harm to crops,[9] and for failing to conduct testing sufficient to ensure their products' safety and efficacy.[10] Manufacturers were also understood to sell pesticides subject to implied warranties of fitness and merchantability, and could be liable as well when products failed to perform as expressly warranted.[11]

The availability of common law actions against pesticide manufacturers is richly documented in a lengthy 1962 anno-

[9] *See, e.g., Grey v. Hayes-Sammons Chemical Co.*, 310 F.2d 291 (5th Cir. 1962); *Branco Eastern Co. v. Leffler*, 482 P.2d 364 (Colo. 1971); *Great Western Oil Co. v. Kraus*, 122 N.E. 12 (Ind. Ct. App. 1919); *Weber v. Fidelity & Casualty Ins. Co.*, 250 So. 2d 754 (La. 1971); *La Plant v. E.I. Du Pont de Nemours & Co.*, 346 S.W.2d 231 (Mo. Ct. App. 1961); *Corprew v. Geigy Chemical Corp.*, 157 S.E.2d 98 (N.C. 1967); *Simpson v. American Oil Co.*, 8 S.E.2d 813 (N.C. 1940); *Patterson v. Orangeburg Fertilizer Co.*, 108 S.E. 401 (S.C. 1921); *Wise v. Hayes*, 361 P.2d 171 (Wash. 1961); *Perry Creek Cranberry Corp. v. Hopkins Ag. Chem. Co.*, 139 N.W.2d 96 (Wisc. 1966); *Smith v. Atco Co.*, 94 N.W.2d 697 (Wisc. 1959).

[10] *E.g., Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F. Supp. 567 (D. S.C. 1965); *Reasor-Hill Corp. v. Kennedy*, 272 S.W.2d 685 (Ark. 1954); *Chapman Chem. Co. v. Taylor*, 222 S.W.2d 820 (Ark. 1949); *Ebers v. General Chem. Co.*, 17 N.W.2d 176 (Mich. 1945).

[11] *See, e.g., McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 (D. Conn. 1960); *Van Antwerp-Aldridge Drug Co. v. Schwartz*, 82 So. 2d 209 (Ala. 1955); *Eaton Fruit Co. v. California Spray-Chem. Corp.*, 445 P.2d 437 (Ariz. 1968); *Burr v. Sherwin Williams Co.*, 268 P.2d 1041 (Cal. 1954); *Sawan, Inc. v. American Cyanamid Co.*, 88 S.E.2d 152 (Ga. 1955); *Diamond Alkali Co. v. Godwin*, 112 S.E.2d 365 (Ga. Ct. App. 1959); *Bean v. Diamond Alkali Co.*, 454 P.2d 69 (Idaho 1969); *Ducote v. Chevron Chem. Co.*, 227 So. 2d 601 (La. Ct. App. 1969); *Ebers v. Gen'l Chem. Co.*, 17 N.W.2d 176 (Mich. 1945); *Corprew v. Geigy Chem. Corp.*, 157 S.E.2d 98 (N.C. 1967); *Simpson v. American Oil Co.*, 8 S.E.2d 813 (N.C. 1940); *Patterson v. Orangeburg Fert. Co.*, 108 S.E. 401 (S.C. 1921); *Swift & Co. v. Bennett*, 373 S.W.2d 569 (Tex. Civ. App. 1963); *Wasatch Chem. Co. v. Leon*, 259 P.2d 301 (Utah 1953); *Udell v. Rohm & Haas Co.*, 392 P.2d 225 (Wash. 1964); *Ingraham v. Assoc. Oil Co.*, 6 P.2d 645 (Wash. 1932); *Dobias v. Western Farmers Ass'n*, 491 P.2d 1346 (Wash. Ct. App. 1971).

tation. It states a then-uncontroversial principle: "A duty of due, reasonable care binds [pesticide] manufacturers and sellers of products of this kind. This duty of care includes a duty to warn of product-connected dangers, a duty on the part of the manufacturer to subject the product to reasonable tests, and a duty on the part of the seller to subject the product to reasonable inspection." *Liability of Manufacturer or Seller for Injury Caused by Animal Feed or Medicines, Crop Sprays, Fertilizers, Insecticides, Rodenticides, and Similar Products*, 81 ALR 2d 138, 144 (1962).

2. *Before 1972, state and federal governments imposed extensive regulations on the content of pesticide labels*

At the same time that these common law damages actions challenging the validity of claims and warnings appearing on pesticide labels were widely proceeding, state and federal law imposed extensive pesticide labeling requirements. In 1910, Congress had enacted the Insecticide Act, ch. 191, 36 Stat. 331, repealed 61 Stat. 163, 172 (1947), which prohibited the sale of pesticides in interstate commerce if they bore labels containing false or misleading information. The 1947 Act, which repealed the Insecticide Act, imposed far more extensive federal labeling requirements. That statute declared a pesticide to be "misbranded" if its label included "any statement . . . which is false or misleading" or "if the label does not contain a warning or caution statement which may be necessary." 1947 Act § 2(z), *codified at* 7 U.S.C. § 135(z) (repealed).

Under the 1947 Act, the Department of Agriculture registered all pesticides moving in interstate commerce, and such registrations required federal approval of the language appearing on the pesticide label.[12] Department of Agriculture regulations required pesticide labels to contain certain features, including the name and address of the manufacturer, an

[12] 1947 Act § 4, *codified at* 7 U.S.C. § 135b (repealed).

ingredient statement, and certain caution or warning statements.[13] Federal regulations dictated the size, typeface, and position of the required label features.[14] Pesticides classified by the federal government as highly toxic were required to bear a label featuring the skull and crossbones symbol, the word "poison" in red lettering against a contrasting background, and emergency precautions.[15] Federal regulations established the language of specific warning statements for particular pesticides, such as benzene hexachloride and DDT.[16] As of November 1970, over 37,000 pesticide products had been registered pursuant to these regulations.[17]

At the same time, states had established extensive pesticide regulations; by 1972, all but two states had adopted pesticide registration laws.[18] State pesticide laws required registration of pesticides for use within the state. Although both the state and federal governments predicated registration on approval of pesticide labels pursuant to a set of regulatory labeling requirements, these requirements generally did not result in conflicting directives to pesticide companies because state agencies generally accepted the validity of federally registered labels.[19] This practice comported with federal policy

[13] 7 C.F.R. §§ 162.6, 162.7, 162.103 (1949).

[14] 7 C.F.R. §§ 162.102-105 (1949).

[15] 7 C.F.R. §§ 162.6, 162.9 (1949).

[16] 7 C.F.R. §§ 162.112, 162.114 (1949).

[17] *See* House Comm. Hearing at 96.

[18] See *id.* at 8, 21-22 (table of state pesticide laws).

[19] *See* Federal Environmental Pesticide Control Act: Hearings Before the Subcomm. on Ag. Research of the Sen. Comm. on Ag. and Forestry, 92d Cong., 1st Sess. (1971) ["1971 Senate Ag. Comm. Hearing"] at 489 (John H. Kirkpatrick, Director, Ag. Chem. Div., Alabama Dept. of Ag. and Industries) ("The State of Alabama registers pesticides without further investigation if a product has a USDA registration number."); Federal Environmental Pesticide Control Act: Hearings Before the Subcomm. on Ag. Research of the Sen. Comm. on Ag. and Forestry, 92d Cong., 2d Sess. (1972) ["1972 Senate Ag. Comm. Hearing"] at 155 (Charles H. Frommer, Director, Bureau of Pesticide Control, New York State Dept. of Env. Conservation); *but see* House Comm. Hearing at 829 (Errett Deck, Wash. Dept. of Ag.) ("Several states violate [the 1947 Act] by issuing state registrations for supplemental labeling for pesticides shipped into their state under a federally registered label.").

under the 1947 Act, in which Congress had considered it "highly desirable that the laws governing [pesticides] be as nearly uniform as possible . . . so that manufacturers may have Nation-wide distribution with a minimum of conflict between the labeling requirements of the various [state] laws."[20]

The state agencies imposed their own labeling requirements on products not covered by the 1947 Act, including pesticides formulated solely for intrastate use, which by 1972 were estimated to number as many as 25,000 products.[21] Some state agencies also registered federally-registered pesticides for uses not approved by the federal government and imposed labeling requirements on products registered under the 1947 Act.[22] In addition, many states' statutes authorized administrative agencies to regulate directly the uses of pesticides, not only their labeling.[23]

3. *At the time of the enactment of the 1972 Act, federal and state labeling requirements were not understood to preempt common law damages actions*

At the time Congress enacted the 1972 Act, the existence of extensive federal and state pesticide labeling requirements was not understood to affect the availability of common law

[20] H.R. Rep. No. 313, at 3 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1202.

[21] *See* 1971 Sen. Ag. Comm. Hearing at 487, 489; Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on the Env't of the Sen. Comm. on Commerce, 92d Sess., 2d Sess. (1972) ["Sen. Commerce Comm. Hearing"] at 146.

[22] *See* 1972 Sen. Ag. Comm. Hearing at 341.

[23] *See* House Comm. Hearing at 21-22.

damages actions. Thus, in a wrongful death action against an insecticide manufacturer, the First Circuit concluded that federal approval of the product's label "merely satisfied" federal law but did not certify that the defendant had met the standard of due care imposed by state law.[24] Rather than supplanting state tort law, federal labeling requirements were widely understood to set minimum standards of care without otherwise altering state common law.[25]

Thus, by 1972, when section 136v(b) was enacted, it was widely recognized that pesticide manufacturers were liable both for personal injuries and crop damage resulting from pesticides, including for the failure to provide adequate warnings and instructions for the use of their products. Courts uniformly recognized that such common law actions did not conflict with extensive federal labeling requirements. As

[24] *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965).

[25] *See, e.g., Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937, 944 (D.S.C. 1969) ("Aside from the requirements set forth for the label by the Secretary of Agriculture, [defendants] had a duty to use a label, or furnish a warning commensurate with the danger."); *Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F. Supp. 567, 572 (D.S.C. 1965) ("Even had the defendant not failed to warn the public as it was required to do by the Federal and State law, it is my opinion that the manufacturer of a hazardous material is under a common law duty to . . . give adequate warning."); *Mungy v. Magnolia Chem. Co.*, 437 S.W.2d 15, 19 (Tex. Ct. App. 1968) ("The statutes and regulations set minimum standards for those marketing economic poisons."); *Rumsey v. Freeway Manor Minimax*, 423 S.W.2d 387, 394 (Tex. Ct. App. 1968) (holding that 1972 Act does not "purport[] to change the common law duty to warn. . . . We are of the view that [the 1972 Act and its regulations] merely set minimum standards."); *Ebers v. General Chemical Co.*, 17 N.W.2d 176, 181 (Mich. 1945) ("Defendant cannot escape liability merely by showing that it followed the recommendations of the United States Department of Agriculture."); *McClanahan v. California Spray-Chem. Co.*, 75 S.E.2d 712 (Va. 1953) (violation of 1972 Act constitutes negligence per se in state tort action); *Perry Creek Cranberry Corp. v. Hopkins Ag. Chem. Co.*, 139 N.W.2d 96, 102 (Wisc. 1966) (same).

discussed in the next section, Congress had no intent to alter this settled body of law when it enacted Section 136v(b).

B. The Legislative History of the 1972 Act Demonstrates that Section 136v(b) Is Directed Solely at the Continued Regulatory Authority of State Agencies in Light of the Expansion of Federal Power

The legislative history of the 1972 Act demonstrates that Congress gave no consideration to preempting any aspect of state tort law and had no intent to eliminate any common law damages remedies. The 1972 Act is not one whose legislative history is scanty, confused, or ambiguous. On the contrary, the legislative history of 1972 Act is voluminous and, on this point, very clear. In 1971 and 1972, three House and Senate committees held 25 days of hearings on proposed pesticide legislation, the transcripts of which fill over 2300 pages.[26] Each committee issued a report, filling over 275 pages.[27] A conference committee issued a 34-page report.[28] Floor debates occurred over five days, the transcripts of which fill over 150 pages in the Congressional Record.[29] What became

[26] *See* House Comm. Hearing; 1971 Senate Ag. Comm. Hearing; 1972 Senate Ag. Comm. Hearing; Sen. Commerce Comm. Hearing.

[27] *See* H.R. Rep. No. 511, 92d Cong., 1st Sess. (1971) ["House Comm. Report"]; Sen. Ag. Comm. Report; S. Rep. No. 838 (Supplemental Report), 92d Cong., 2d Sess. (1972) ["Supplemental Sen. Ag. Comm. Report"]; S. Rep. No. 970, 92d Cong., 2d Sess. (1972) ["Sen. Commerce Comm. Report"].

[28] H.R. Conf. Rep. No. 1540, 92d Cong., 2d Sess. (1972) ["Conf. Comm. Report"].

[29] 117 Cong. Rec. H10674-H10680 (Daily Edition, Nov. 8, 1971) (House debate); 117 Cong. Rec. H10726-10774 (Daily Edition, Nov. 9, 1971) (House debate and passage); 118 Cong. Rec. S15885-S15900 (Daily Edition, Sept. 26, 1972) (Sen. debate and passage); 118 Cong. Rec. S16977-S16981 (Daily Edition, Oct. 5, 1972) (Sen. debate and passage of conference report); 118 Cong. Rec. H9795-H9798 (Daily Edition, Oct. 12, 1972).

Section 136v was debated at considerable length. But, in those thousands of pages of hearings, reports, and transcripts of floor debates, there is precisely *no* mention of any concern about the availability of state tort law—and no discussion of the preemption of any aspect of state tort law.

1. *The legislative history of the 1972 Act is devoid of any suggestion of an intent to preempt common law damages actions*

EPA General Counsel John Quarles, appearing as the first witness in the first committee hearing on the Administration's proposed pesticide bill, stated unequivocally: "The bill does not affect tort liability."[30] No witness appearing thereafter, nor any Member of Congress, suggested otherwise. While the legislative history includes several other scattered references to the availability of common law damages actions, none suggest any intent to preempt such actions.[31]

---

[30] House Comm. Hearing at 42. The statement came in response to a question from Rep. Foley, who asked Mr. Quarles whether application of pesticides in compliance with EPA regulations would "grant complete immunity" to the applicator and establish "prima facie evidence of complete compliance with the law." Rep. W.R. Poage, Chairman of the House Agriculture Committee, interrupted to ask whether Rep. Foley was suggesting that the bill would immunize users of pesticides from common law damages actions: "Surely, you do not mean to say that if I have a mesquite pasture here, and Mr. Stubblefield had a field of cotton adjoining it, and I sprayed 2,4,5-T on my mesquite pasture, and it goes over on his property, he would not have a cause of action against me?" After Mr. Quarles gave the answer quoted above, Rep. Foley clarified that his question was directed at immunity from statutory penalties, not common law damages.

[31] For instance, the Senate Commerce Committee Report includes a letter from Professor John J. Flynn, who stated that federal pesticide law should "insure to a limited degree that the product will perform its function without substantial adverse effects on the environment" even though "the common law of negligence and warranty already imposes such a burden upon the manufacture of a product." Sen. Commerce Comm. Report at 18. A witness for Hercules, Inc., a pesticide manufacturer, acknowledged that his company had been sued for products liability, and a witness for a pest control trade association likewise acknowledged liability suits, adding that they had "never been a problem that was serious enough for us to consider it a difficulty." House Comm. Hearing at 415; 1971 Sen. Ag. Comm. Hearing at 467. An entomologist mentioned that he had appeared as an expert witness in two cases brought by farmers against pesticide manufacturers. 1971 Sen. Ag. Comm. Hearing at 612. A witness for migrant farm workers, advocating that EPA require that pesticide labels include warnings on how long laborers should avoid fields after pesticide application, suggested that such a labeling requirement might "facilitate the conduct of law suits" by providing "some evidence of what the standard of care is." 1972 Sen. Ag. Comm. Hearing at 314.

Over the course of the hearings, thirty-three witnesses testified on behalf of the pesticide industry, and not one suggested that the availability of common law damages actions undermined their ability to produce uniform labels, and none of these industry witnesses asked for federal protection from common law damages actions.[32] The industry

Debate over the 1972 Act's indemnification provision, enacted as 7 U.S.C. § 136m, suggests that Congress anticipated that state damages actions would remain available to provide redress for harms caused by pesticides. Section 136m requires that, under certain circumstances when EPA cancels a pesticide registration and thereby removes it from the market, the government must make an indemnity payment to those in possession of the now unusable and worthless pesticide. In the Senate Commerce Committee Hearing, Senator Curtis asked whether the provision was intended to indemnify pesticide manufacturers "in case of injury to an individual's health or life," but David D. Dominick, EPA Assistant Administrator, explained that "[t]he indemnities do not go to liability for tort or other public problems of that sort." 1972 Sen. Ag. Comm. Hearing 93. On the House Floor, a similar question was raised as to whether the indemnity provision was intended to provide compensation for persons injured by pesticides; Representative Teague explained that it "has nothing to do with losses they might have suffered because of any damage done by pesticides." 117 Cong. Rec. H10758 (Daily Edition, Nov. 9, 1971).

[32] *See* House Comm. Hearing at 279-287 (Robert L. Ackerly, Chemical Specialties Manuf's Assn., Inc.); *id.* at 288-316 (R.E. Naegele and Donald

witnesses expressed various concerns about federal regulation of pesticides and the proposed new pesticide law, including reservations about the increased regulatory power of EPA and fear that EPA might cancel pesticides' registrations without taking sufficient account of the chemicals' benefits or the scientific evidence.[33] Industry witnesses also expressed concerns about the costs imposed on pesticide manufactures by federal regulation.[34] But the concerns raised by the industry

D. McCollister, Dow Chemical Co.); *id.* at 316-322 (William Brehm and C.P. Stephenson, United Pesticides Formulation and Dist'rs Assn.); *id.* at 322-328 (Wayne F. Gustafson, Gustafson Manufacturing, Inc.); *id.* at 329-333 (Richard H. Wellman, Union Carbide Corp.); *id.* at 333-369 (Parke C. Brinkley and John D. Conner, Nat'l Ag. Chems. Assn.; John J. Hood, Dr. C. Boyd Shaffer, and Dr. Frank L. Lyman, Ciba-Geigy Corp.); *id.* at 369-370 (Lewis E. Goyette, Southeastern Ag. Chems. Assn.); *id.* at 370-375 (H.L. Straube, Iver C. MacDougall, and A.B. Linquist, Stauffer Chem. Co.); *id.* at 377-383 (K.R. Fitzsimmons and Dr. M.J. Sloan, Shell Chem. Co.); *id.* at 383-394 (J.G. Copeland, Dr. John P. Frawley, John G. Kuniholm, Charles L. Dunn, and Kenneth T. Givens, Hercules, Inc.); *id.* at 394-398 (Richard A. McDonald, Paper Products, Inc.); *id.* at 398-417 (Dr. Donald A. Spencer, Ciba-Geigy Corp.); 1971 Sen. Ag. Comm. Hearing at 411-415 (Carlos Kampeier, Nat'l Ag. Chems. Assn.); *id.* at 415-421 (Parke C. Brinkley, Nat'l Ag. Chems. Assn.); *id.* at 421-460 (John D. Conner, Nat'l Ag. Chems. Assn.); *id.* at 461-468 (William L. Brehm, United Pesticide Formulators & Dist'rs Assn.); *id.* at 468-469 (Roland L. Rhodes, United Pesticide Formulators & Dist'rs Assn.); *id.* at 469-473 (C.P. Stephenson, United Pesticide Formulators & Dist'rs Assn.); *id.* at 508-513 (Arthur B. Chivvis, Chem. Specialties Manuf'rs Assn.); *id.* at 536-548 (J.G. Copeland, Jr., Hercules, Inc.); 1972 Sen. Ag. Comm. Hearing at 239-259 (Edward K. Hertel, Nat'l Ag. Chems. Assn.); *id.* at 259-261 (Parke C. Brinkley, Nat'l Ag. Chems. Assn.); *id.* at 262-268 (Carlos Kampmeier, Nat'l Ag. Chems. Assn.); Sen. Commerce Comm. Hearing at 133-156 (David Phillipson and John D. Conner, Nat'l Ag. Chems. Assn; John J. Hood, Ciba-Geigy Corp.; Dr. C. Boyd Shaffer, American Cyanamid Co.; Dr. John S. Tobin, Niagara Chem. Div.; and Dr. Ronald Spencer, Nat'l Ag. Chems. Assn.).

[33] *See, e.g.*, House Comm. Hearing at 280-281, 288-302, 331, 407, 439, 814.

included no objection to the continued availability of common law damages actions.

Thirty witnesses testified on behalf of federal regulatory authorities, but not one suggested that the availability of state common law damages actions, including actions challenging the adequacy of federally approved labels, created any conflict with federal regulations or posed any obstacle to the effective administration of federal labeling regulations.[35]

[34] *See, e.g., id.* at 302, 332, 349; 1971 Sen. Ag. Comm Hearing at 413; 1972 Sen. Ag. Comm. Hearing at 257. To address this concern, the pesticide industry successfully sought indemnification from the federal government to pay pesticide manufacturers, dealers, and consumers the market rate of any pesticides they held at the time of suspension or cancellation. *See* 7 U.S.C. § 136m.

[35] *See* House Comm. Hearing at 33-52 (John Quarles, Ray Johnson, and Lowell E. Miller, EPA); *id.* at 53-88 (J. Phil Campbell, Dr. Francis J. Mulhern, Dr. H.C. Cox, Dr. Velmar W. Davis, Arthur W. Greely, Lotus Therkelsen Prokop, Dr. Fred H. Tschirely, Turner Oyloe, and Dr. Ned Bayley, U.S. Dept. of Ag.); *id.* at 89-111 (Dr. Albert C. Kolbye, Lessell L. Ramsey, and Reo Duggan, FDA); *id.* at 111-120 (Harrison Loesch and Paul E. Thompson, U.S. Dept. of the Interior); *id.* at 120-135 (Edwin M. Cronk and Joseph E. O'Mahony, U.S. Dept. of State); *id.* at 137-148 (Dr. E.F. Knipling, U.S. Dept. of Ag.); *id.* at 152-164 (David E. Ketcham, U.S. Dept. of Ag.); *id.* at 169-180 (W.B. Ennis, Jr., U.S. Dept. of Ag.); *id.* at 180-188 (W.D. McClellan, U.S. Dept. of Ag.); *id.* at 707-728 (Russell Train, President's Council on Environmental Quality); *id.* at 728-751 (William D. Ruckelshaus, EPA); 1971 Sen. Ag. Comm. Hearing at 160-191 (Russell E. Train, President's Council on Environmental Quality); *id.* at 191-203 (Dr. Ned D. Bayley, U.S. Dept. of Ag.); *id.* at 203-206 (Lotus Prokop, U.S. Dept. of Ag.); *id.* at 206 (Dr. Francis Mulhern, U.S. Dept. of Ag.); *id.* (Dr. T.C. Byerly, U.S. Dept. of Ag.); *id.* at 207-211 (Fred H. Tscherley, U.S. Dept. of Ag.); *id.* at 290-302 (William D. Ruckelshaus, EPA); *id.* at 302-307 (Dr. Raymond Johnson, EPA); *id.* at 307-325 (John R. Quarles, EPA); 1972 Sen. Ag. Comm. Hearing at 80-98 (David D. Dominick, EPA); *id.* at 98-111 (Dr. William M. Upholt, EPA); *id.* at 111-114 (T.C. Byerly, U.S. Dept. of Ag.); *id.* at 114-116 (Harold Carter, U.S. Dept. of Ag.); Sen. Commerce Comm. Hearing at 156-170 (David D. Dominick, Dr. William M. Upholt, and Charles Fabrikant, EPA).

Thirty-eight witnesses also testified on behalf of pesticide users, including representatives of farmers, exterminators, and homemakers.[36] These witnesses generally were concerned that Congress might overly restrict the availability of pesticides, but none of them expressed any concern that the proposed law might eliminate their existing right to obtain compensation in the event they suffered personal or economic injury resulting from pesticide manufacturers; false claims, ineffective products, or inadequate warnings.

[36] *See* House Comm. Hearing at 419-424 (Ralph E. Neal, National Pest Control Assn.); *id.* at 424-427 (Robert Russell, Orkin Exterminating Co.); *id.* at 427-432 (James W. Streckel, National Pest Control Assn.); *id.* at 433-441 (Lon Mann, Bruce Lynn, and Dr. James Brown, National Cotton Council); *id.* at 457-478 (Clifford G. McIntire, Boswell Stevens, and Richard McGuire, American Farm Bureau); *id.* at 483-488 (Don F. Magdanz and Oscar Breedthauer, National Livestock Feeders Assn.); *id.* at 488-491 (Robert J. Sullivan, Christmas Tree Growers Assn.); *id.* at 491-496 (Robert E. Lee III, American Pulpwood Assn.); *id.* at 496-520 (William H. Lawrence and John F. Hall, National Forest Products Assn.); *id.* at 521-526 (L.C. "Clell" Carpenter and Stuart Spradling, Mid-Continent Farmers Assn.); *id.* at 526-530 (Henry M. Tobey and Charles Hromada, Cook Indus., Inc.); *id.* at 530-534 (Betty Chapman, "Housewife"); *id.* at 540-543 (Richard T. O'Connell, National Council of Farmer Cooperatives); *id.* at 543-555 (Reuben Johnson, National Farmers Union); *id.* at 558-562 (John Matthews and C.W. McMillan, American National Cattlemen's Assn.); *id.* at 566-575 (John W. Scott and Robert M. Frederick, National Grange); *id.* at 590-594 (Bailey Sanistevan and Virgil Mowry, California Fieldmen's Assn.); *id.* at 594-609 (Harry L. Graham, National Farmers Org.); 1971 Sen. Ag. Comm. Hearing at 211-223 (Lon Mann, National Cotton Council of America); *id.* at 223-253 (Dr. James M. Brown, National Cotton Council of America); *id.* at 253-262 (L.C. "Clell" Carpenter and Stuart Spradling, Missouri Farmers Assn.); *id.* at 262-273 (John W. Scott and Robert M. Frederick, National Grange); *id.* at 273-277 (Harry L. Graham, Nat'l Farmers Org.); *id.* at 346-351 (Clifford G. McIntyre, American Farm Bureau); *id.* at 351-358 (J.D. Hays, American Farm Bureau Fed'n); *id.* at 389-395 (Robert E. Lee III, American Pulpwood Assn.); *id.* at 395-403 (J. Edwin Moore, American Pulpwood Assn.); *id.* at 499-508 (Dr. Ralph E. Heal, National Pest Control Assn.); *id.* at 603-608 (Robert M. Russell and Dr. Michael Shinkle, Orkin Exterm'g Co.); *id.* at 699-703 (Henry M. Tobey, Cook Indus.); 1972 Sen. Ag. Comm. Hearing at 233-239 (Reuben L. Johnson, Nat'l Farmers Union); *id.* at 285-289 (Dr. Ralph E. Heal, Nat'l Pest Control Ass'n); *id.* at 289-293 (L.C. Carpenter and Stuart Spradling, Missouri Farmers Assn.); *id.* at 299-300 (Robert M. Russell, Orkin Exterm'g Co.); *id.* at 305-314 (Kevin Carey, Migrant Legal Action Program); *id.* at 317-348 (A.V. Krebs, Agribusiness Accountability Project); *id.* at 348-354 (Jeffrey Liddle, Orange County Legal Svcs. Project); *id.* at 354-362 (Anita Johnson, Public Interest Res. Gp.); Sen. Commerce Comm. Hearing at 78-90 (A.V. Krebs, Valerie Kantor, and Jerry Berman, Migrant Legal Action).

In the committee reports, floor debates, and conference committee report on the 1972 Act, Congress carefully and repeatedly described the changes it intended to make through the Act.[37] No mention was made that the Act would eliminate any of the common law remedies long and widely available to persons injured by pesticides. The absence of any discussion of eliminating common law damages actions contrasts sharply with the voluminous testimony Congress heard regarding the harms to human health posed by pesticides.[38]

[37] *See* House Comm. Report at 1-2, 12-13; Sen. Ag. Comm. Report at 1-2, 4-6; Sen. Commerce Comm. Report at 8; 118 Cong. Rec. S15889 (Daily Edition, Sept. 26, 1972); *id.* at S15893-15894 (Sen. Allen); 118 Cong. Rec. H9795 (Daily Edition, Oct. 12, 1972).

[38] *See, e.g.,* Sen. Commerce Comm. Report at 27 ("[A]s many as 800 workers are killed each year and over 800,000 injured as a result of the unwise and improper use of pesticides"); House Comm. Report at 71 (additional views of Rep. John Dow) (citing reports that 50,000 people in U.S. are poisoned by pesticides annually); House Comm. Hearing at 111-120 (Harrison Loesch, Assistant Secretary of the Interior); *Id.* at 138 (Dr. E.F. Knipling, Science Adviser to U.S.D.A.); *Id.* at 708 (Russell Train, Chairman, President's Council on Environmental Quality); 1971 Sen. Ag. Comm. Hearing at 539 (J.G. Copeland, Hercules, Inc.); *id.* at 791 (Charles M. Creuziger, Veg. Growers Assn. of America); 1972 Sen. Ag. Comm. Hearing at 98 (Dr. William M. Upholt, Deputy Assistant Administrator for Pesticide Programs, EPA); *id.* at 310 (Max B. Rothman, Farm Worker Div., Camden Regional Legal Services); *id.* at 318 (A.V. Krebs, Agribusiness Accountability Project).

What a plurality of this Court said in *Medtronic* with regard to the Medical Devices Amendments of 1976 applies equally to the 1972 Act: "There is, to the best of our knowledge, nothing in the hearings, the committee reports, or the debates suggesting that any proponent of the legislation intended a sweeping pre-emption of traditional common law remedies . . . If Congress intended such a result, its failure even to hint at it is spectacularly odd." 518 U.S. at 491. Had Congress intended to deprive persons injured by mislabeled pesticides of the right to compensation for their injuries, one would expect Congress to have mentioned this intent somewhere in the many thousands of pages of legislative history. It did not.

On the contrary, the 1972 Act was enacted in large part to provide increased protection against these harms.[39] Preemption of state damages actions would thus "have the perverse effect of granting complete immunity . . . to an industry that, in the judgment of Congress, needed more stringent regulation." *Medtronic*, 518 U.S. at 487 (plurality opinion).

2. *The legislative history confirms that Section 136v was directed solely at the continuing regulatory authority of state administrative agencies*

The legislative history of the 1972 Act makes clear that Section 136v was directed at a concern entirely unrelated to the availability of state tort damages. The provision seeks to delineate the authority of state agencies to regulate pesticides. While the availability of common law damages actions was never discussed or debated over the course of the history of the 1972 Act, the issue of the continuing regulatory authority of state administrative agencies was a subject of voluminous hearing testimony, was discussed in every committee report,

[39] Sen. Ag. Comm. Report at 3 (stating the 1972 Act provides increased "protection of man and his environment").

and was debated at length on the floor of both the House and Senate.[40]

The changes in pesticide regulation proposed for (and, to a substantial, but lesser extent, effected by) the 1972 legislation necessitated extensive consideration of the state administrators' regulatory because the Act extended federal authority into two subject matter areas that previously had been regulated exclusively by the states: direct regulation of pesticide use and registration of pesticides formulated for intrastate use.[41]

[40] *See, e.g.,* House Comm. Hearing at 478-483 (Charles P. Ellington, Stanwood Cath, Dr. Vincent Stewart, and Jonn Hillis, National Assn. of State Depts. of Ag.); 1971 Sen. Ag. Comm. Hearing at 325-346 (Charles P. Ellington, National Assn. of State Depts. of Ag.); *id.* at 486-491 (W.A. Ruffin, Ala. Dept. of Ag. and Indus.); *id.* at 491-496 (John H. Kirkpatrick, Ala. Dept. of Ag. and Indus.); *id.* at 496-499 (J.R. Conley, Ga. Dept. of Ag.); 1972 Sen. Ag. Comm. Hearing at 116-123 (Dr. Donald R. Isleib, Mich. Dept. of Ag.); *id.* at 151-156 (Charles H. Frommer, New York Dept. of Environmental Conservation); *id.* at 268-285 (Errett Deck, Assn. of American Pesticide Control Officials); House Comm. Report at 1-2, 16; Sen. Ag. Comm. Report at 16-17, 30; Sen. Commerce Comm. Report at 7, 44; Supplemental Sen. Ag. Comm. Report at 51-57; Conf. Comm. Report at 33; 117 Cong. Rec. H10740-H10744, H10751 (Daily Edition, Nov. 9, 1971); 118 Cong. Rec. S15888-S15889, S15893-S15894 (Daily Edition, Sept. 26, 1972); 118 Cong. Rec. H9184 (Daily Edition, Oct. 5, 1972); 118 Cong. Rec. 16978 (Daily Edition, Oct. 5, 1972).

[41] *See* Sen. Ag. Comm. Report at 1 ("The new bill would (A) regulate the use of pesticides to protect man and his environment; and (B) extend Federal pesticide regulation to actions entirely within a single State."); *see also* Statement by the President Upon Signing the Bill Into Law (Oct. 21, 1972) (declaring that the 1947 Act did "not address the problem of misusing properly registered pesticides and it did not control pesticides which moved solely in intrastate commerce. The new law remedies these defects."); 118 Cong. Rec. S15893 (Daily Edition Sept. 26, 1972) (Sen. Allen) ("[T]his bill does two things. First, it provides for regulating the use of pesticides, as distinguished from their labeling and interstate distribution. Second, it extends pesticide regulation to intrastate commerce.").

a. The committee hearings. The original pesticide bill sponsored by the Nixon Administration and introduced in the House by Representative W.R. Poage, Chairman of the House Agriculture Committee, did not directly address the authority of state agencies to continue their programs of pesticide registration and regulation.[42] Testifying on behalf of the Administration, EPA General Counsel John Quarles emphasized that the bill was intended to maintain state agencies' authority to regulate pesticide use more stringently than did the federal government: "States thus are not precluded from imposing stricter standards or added requirements."[43]

Notwithstanding the Administration's indicated intent, witnesses for the states were greatly troubled by the absence of a provision expressly affirming that their regulatory authority was undiminished. The representative of the National Association of State Departments of Agriculture testified that: "It is our feeling that it will be better for Congress to clearly indicate its intentions in this bill rather than leaving this area a glaring omission and have a battery of fellow lawyers and courts trying to answer these questions later on."[44] Witnesses for the state agencies feared that the bill could be construed to completely oust them of their existing authority.[45] The state

[42] *See* H.R. 4152, 92d Cong., 1st Sess. (introduced Feb. 10, 1971), *reprinted in* House Comm. Hearing at 859-904.

[43] House Comm. Hearing at 8.

[44] 1971 Sen. Ag. Comm. Hearing at 338.

[45] *See, e.g.,* House Comm. Hearing at 851 (H.L. Bruer, Tenn. Dept. of Ag.) ("We find several objectionable features in this Bill, one of them being that the Bill, as now drawn, pre-empts all authority for the registration and regulation of sale and use of pesticides."); 1971 Sen. Ag. Comm. Hearing at 336 (Dr. Charles P. Ellington, National Assn. of State Depts. of Ag.) ("The bill before you would completely preempt State registration and if enacted and enforced as written there would no longer be any need for State registration laws."); *id.* at 339 ("We are concerned however, Mr. Chairman, over the bill as it is written now completely preempting State programs that are in effect today."); 1971 Sen. Ag. Comm. Hearing at 745 (Dave L. Pearce, Commissioner, Louisiana Dept. of Ag.) ("Perhaps the worst feature of the proposed Act is that it takes pesticide regulation from state control.").

agencies expressed concern about the loss of jobs and funding that might result if their functions were taken over by EPA.[46] The states were also concerned about the potential preemption of their authority to regulate the uses of pesticides, to register pesticides for local uses not approved by the federal government, and to register "intrastate" pesticides.[47] The state

[46] *See* House Comm. Hearing at 479-480 (Charles P. Ellington, Director, Maryland Board of Ag., on behalf of Nat'l Ass'n of State Depts. of Ag.) ("[T]here are 250 people experienced in pesticide registration and inspection that are on the job today in the States. The bill before you would completely preempt States in this field if enacted and enforced as written."); *id.* at 513-514 (Dr. Vincent E. Stewart, Florida Dept. of Ag.) ("We have 25 laboratory personnel who are involved in chemical examination of pesticides and pesticide residues. We have 13 . . . full-time pesticide inspectors. . . . [I]f this bill . . . passes, this will eliminate the registration of pesticides in our State."); *id.* at 517 (Dr. Ellington) ("[T]here would no longer be any need for us to be in the registration business, we would simply get out of it. . . . I can almost predict with certainty that in a matter of a few years, there will be no State registration programs at all unless there is this cooperative program or joint program that I mentioned. And the bill is not specific in this regard."); 1971 Sen. Ag. Comm. Hearing at 336 (Ellington).

[47] House Comm. Hearing at 829 (Errett Deck, Wash. Dept. of Ag.) ("There is no provision for state registered uses which deviate in any way from the labeling of a pesticide registered for interstate shipment."); *id.* at 851 (H.L. Bruer, Tenn. Dept. of Ag.) ("The Bill would make it impossible for a State to register a pesticide material for a purely local need and use."); *id.* at 857 (James A. Graham, NC Dept. of Ag.) ("The proposed Law does not provide for state registered uses which deviate from the labeling of a federally registered pesticide. . . . I agree with the idea that uniform labeling of pesticides across the country should be promoted as is encouraged by the Law when feasible. However, the single label concept cannot provide for the proper use of pesticides in all areas of the country. Each state must be allowed to further restrict uses of certain pesticides due to unique situations or environmental problems that may arise."); 1971 Sen. Ag. Comm. Hearing at 497 (J.R. Conley, Ga. Dept. of Ag.) ("We do not wish to imply that we are opposed to regulations at the Federal level

agencies proposed that the Administration's bill be amended to clarify that the states maintained their existing regulatory authority in these areas.[48]

Witnesses for the pesticide industry were also concerned about the absence of a provision delineating state regulatory authority. These witnesses were concerned that, if the states were allowed to maintain their existing authority to register pesticides and thereby regulate the content of pesticide labels, different state agencies might impose conflicting label requirements, making it impossible for manufacturers to produce a pesticide with a single label for national marketing. As the general counsel for the Chemical Specialties Manufacturers Association testified:

> [The proposed bill] invites a multiplicity of requirements. Some States might want the word "flammable," some "inflammable." . . . Some States might want red lettering; others orange, another yellow, and so forth. We ask this committee, therefore, to recognize, as the Congress has in a number of similar statutes, the

as is borne out by our current cooperative efforts, but we do with to emphasize that we, like all the other States, have regional and local problems which sometimes require immediate, severe, and unconventional means of attack."); *id.* at 498 ("Provision is made that no product which is not federally registered could be sold within a State, and with Federal registration procedures what they are today, the State departments of agriculture and other agencies would be helpless to provide assistance in times of local crises."); *id.* at 486 (W.A. Ruffin, Alabama Dept. of Ag. and Industries) ("We oppose this bill because it abrogates State authority and responsibility to regulate pesticide products intrastate. . . . Local problems are best handled by knowledgeable personnel either responsible to or working in State government who are aware of local needs.").

[48] *See* House Comm. Hearing at 829 (Errett Deck, Wash. Dept. of Ag.); *see also id.* at 796 (proposal of American Frozen Food Institute to allow states to approve supplemental label for uses allowed in their states); 1971 Sen. Ag. Comm. Hearing at 754 (same).

> industry's need for uniformity by providing for this in the act.[49]

As the witness explained, uniformity of labeling requirements was important because of the expense of producing pesticide packaging for national marketing.[50] As another industry witness explained, "If each state were free to impose labeling, packaging, or other restrictions on the manufacturer, such regulatory procedures would become unworkable for responsible national firms."[51] The president of the National Agricultural Chemicals Association asserted that, with federal registration of all pesticides, including intrastate pesticides, "there would be no need or room for conflicting State or local regulations."[52]

Witnesses for the state pesticide-regulating agencies took differing positions on federal preemption of state authority to impose labeling requirements. On one hand, a witness for the New York agency responsible for regulating pesticides indicated support for a general prohibition on state-imposed labeling requirements, declaring that "[i]t makes it a lot easier for the manufacturer to put on one label rather than 50 labels, plus possibly a label for each of the territories."[53] On the other hand, witnesses representing other state agencies opposed such a prohibition on the ground that it precluded the states from developing labeling regulations that were stricter

[49] House Comm. Hearing at 281-283 (Robert L. Ackerly).

[50] *Id.*; *see also* 1971 Sen. Ag. Comm. Hearing at 508 (Arthur B. Chivvis, President, Chemical Specialties Manufacturers Assn.) ("To invite States to ignore the Federal registration and impose their own separate requirements on the label would create a nightmare. The distribution practices of the industry preclude marketing one product in Maryland, one in New York, *et cetera*.").

[51] *Id.* at 802 (A.M. McVie, President of Elanco Products, Inc.).

[52] 1971 Sen. Ag. Comm. Hearing at 418.

[53] 1972 Sen. Ag. Comm. Hearing at 153 (Charles Frommer, Dir., Bur. of Pesticide Control, NY State Dept. of Env. Conservation).

than those of the federal government.[54] Environmental groups too supported the authority of state agencies to impose labeling requirements stricter than those imposed by EPA.[55]

b. The development of Section 136v in the House and Senate. To address the various concerns over the authority of the state regulatory bodies raised by both the state agencies and the pesticide industry, the House Agriculture Committee amended the administration's bill to add Section 24, a provision expressly addressing the authority of the state agencies. As passed by the Committee, Section 24 had three subsections, which—after several significant changes—were enacted into law and codified in Section 136v. In the House Committee's original version, subsection (a) would have allowed the states to regulate the use of only one class of pesticides ("restricted use" pesticides) more strictly than the federal government, as long as the states did not require permits or licenses to use such pesticides; subsection (b) would have prohibited the states from imposing or continuing in effect any labeling requirements different from those

[54] *Id.* at 275 (Errett Deck, Wash. Dept. of Ag., on behalf of National Assn. of State Depts. of Ag. and the Assn of Am. Pesticide Control Officials) ("[S]tates which now require a quantitative percentage active ingredient statement will be forced to accept labeling without the percentage of each active ingredient because of the labeling pre-exemption [sic] provision of Sec. 24(b)."); *id.* at 374 (Irwin Mann, Jr., Director, Oregon Dept. of Ag.); *id.* at 376 (Clinton E. Jeffers, Commissioner, Colorado Dept. of Ag.) ("HR 10729 as introduced into the Senate . . . does permit the States to restrict the uses of any pesticides under the authority of Section 24(a), but subparagraph (b) of this section negates such authority.");1972 Sen. Ag. Comm. Hearing at 374 (Irwin Mann, Jr., director Oregon Dept. of Ag.) ("We, therefore, urge that you give consideration to amending Section 24(c) of HR 10729 to permit states to determine their need for pest control, to determine directions for use, and to register all pesticides distributed and used within their boundaries."); *id.* at 376 (Clinton E. Jeffers, Comm'r, Colo. Dept. of Ag.).

[55] *Id.* at 137 (Sierra Club proposal); *id.* at 168 (William A. Butler, Environmental Defense Fund).

imposed by the EPA; and subsection (c) would have left state regulators with a very limited role in the registration of intrastate pesticides, allowing them to "assist" EPA in registering pesticides for intrastate distribution but otherwise preempting them from imposing any requirements on the labels for intrastate pesticides.[56]

In the debates on the House Floor, many House Members opposed the proposed subsection (a) because it limited state authority to establish stricter regulations on the use of pesticides. As these opponents explained, precluding the states from controlling pesticide uses "would gut the laws of such States where such laws are stricter than the Federal regulation."[57] In response, Representative Kyl introduced an amendment to subsection (a), which was adopted by the House and subsequently enacted into law, protecting the authority of state regulators to impose limitations on pesticide use more stringent than those imposed by EPA.[58]

Meanwhile, subsection (c) was revised by the Senate Agriculture and Forestry Committee to reaffirm states' authority to register pesticides for local uses. Although the state agency witnesses had generally accepted the proposition that labeling requirements should be uniform in order to allow pesticide manufacturers to market their products

[56] H.R. 10729 § 24 (Sept. 16, 1971), *reprinted in* 117 Cong. Rec. H10733 (Daily Edition, Nov. 9, 1971).

[57] 117 Cong. Rec. H10740 (Daily Edition, Nov. 9, 1971) (Rep. Dow); *see also id.* (Rep. Helstoski) ("The preemption of State authority in section 24 seems clearly aimed at the heart of these strong State programs."); *id.* at H10741 (quoting letter from Henry L. Diamond, Commissioner, New York Dept. of Env. Conservation); *id.* (quoting letter from Richard J. Sullivan, Commissioner, New Jersey Dept. of Env. Protection); *id.* (quoting telegram from Daniel W. Lufkin, Conn. Comm. of Env. Protection); *id.* at H10742 (Rep. Harrington); *id.* at H10743 (Rep. Abzug); *id.* at H10743 (Rep. Anderson); *id.* at H10744 (Rep. Wolff).

[58] *Id.* at H10751.

nationally,[59] they fought to maintain their authority to register pesticides for local uses additional to those approved by the federal government—and thereby to regulate the content of supplemental labels for use only in their individual states.[60] As passed by the Senate, and subsequently enacted into law, subsection (c) preserves state regulators' authority to register pesticides formulated for in-state use.[61]

c. Discussion of Section 136v in the House and Senate Committee Reports. The four House and Senate committee reports describe in considerable detail the changes in pesticide regulation Congress intended to accomplish through the 1972 Act. The reports agree that "[t]he thrust of these amendments is to change FIFRA from a labeling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides."[62] The reports discuss state agencies' continuing authority to regulate pesticide use and emphasize that the bill

[59] *See, e.g.*, House Comm. Hearing at 834 (Maurice B. Rowe, Commissioner of Virginia Dept. of Ag.) ("[W]e can understand why manufacturers, most of whom are distributing their products in many states, need uniformity in labeling requirements."); *id.* at 835 (recognizing that national registration of pesticides would "lessen the problem of manufacturers developing special labels for individual state requirements"); 1971 Sen. Ag. Comm. Hearing at 346 (Dr. Charles P. Ellington, National Assn. of State Depts. of Ag.).

[60] *See* 1972 Sen. Ag. Comm. Hearing at 153-155 (Charles H. Frommer, New York Bureau of Pesticide Control); *id.* at 269 (Errett Deck, Wash. Dept. of Ag., on behalf of National Assn. of State Depts. of Ag. and the Assn of Am. Pesticide Control Officials), *id.* at 371 (James A. McHale, Penn. Sec. of Ag.); *id.* at 374 (Irwin Mann, Jr., director Oregon Dept. of Ag.) *id.* at 376 (Clinton E. Jeffers, Commissioner, Colorado Dept. of Ag.).

[61] H.R. 10729 § 23(c) (July 19, 1972), *reprinted in* Sen. Ag. Comm. Report at 71; *see* Conf. Comm. Report at 33 (subsection (c) "[m]akes it clear that a state may provide registration to meet special local needs (subject to disapproval by the Administrator)").

[62] House Comm. Report at 1; *see also* Sen. Ag. Comm. Report at 1-2; Sen. Commerce Comm. Report at 8.

was intended to establish a "coordinated Federal-State administrative system to carry out the new program."[63]

The reports explain the changes in pesticide regulation intended to be accomplished through the 1972 Act, and offer detailed comparisons between old and new laws—without any mention of any effect the 1972 Act would have on state common law damages actions.[64] Each of the two Senate reports contains the same, single sentence addressing the limitation on state authority to impose labeling requirements: "Subsection (b) preempts any State labeling or packaging requirements differing from such requirements under the Act."[65] If Congress intended subsection (b) to eliminate the longstanding right of persons injured by mislabeled pesticides to receive compensation, it expressed this intention in astonishingly oblique language.

The House Committee Report uses somewhat different language, declaring that the bill "is intended to completely preempt State authority in regard to labeling and packaging."[66] In their Brief in Opposition submitted to this Court, Respondents relied on this language to support their assertion that Congress intended to preempt any common law damages actions that challenge the adequacy of warnings, instructions, or claims made on pesticide labels.[67] But, whatever the House Agriculture Committee may have meant in expressing an intent to "completely" preempt state labeling authority, this intent was not actually carried out in the 1972 Act. As the committee report states, a key aspect of the intent to "completely" preempt state labeling authority was that, under subsection (c),

[63] House Comm. Report at 1; *see id.* at 1-2, 16, 28; Sen. Ag. Comm. Report at 2, 29-30; Sen. Commerce Comm. Report at 7, 29-30, 44.

[64] *See* House Comm. Report at 1-2, 12-13; Sen. Ag. Comm. Report at 1-2, 4-6; Sen. Commerce Comm. Report at 8.

[65] Sen. Ag. Comm. Report at 30; Sen. Commerce Comm. Report at 44.

[66] House Comm. Report at 16; *see* id. *at* 1-2 ("State authority to change Federal labeling and packaging is completely preempted.").

[67] *See* Brief in Opposition, No. 03-388, at 7-8.

EPA, not the states, would register pesticides for additional uses to meet local state needs.[68] That provision was not, however, enacted into law, and subsection (c) as enacted preserves the states' authority to register pesticides for additional uses within that state and thereby to impose labeling requirements on such pesticides. Moreover, to the extent that subsection (b) generally precludes the states from imposing labeling "requirements," there is no support for construing that term to preclude any common law damages remedies.

* * *

As the history of the 1972 Act makes clear, the three subsections of Section 136v together address a narrow, albeit important subject in the regulation of pesticides—the ongoing authority of state pesticide-regulating agencies in wake of the expansion of federal pesticide authority effected by the Act. Read together, these parts of Section 136v establish: (a) that state agencies generally may regulate a pesticide's use more strictly than the federal government has chosen to; (b) that, in doing so, states ordinarily cannot impose labeling requirements; and (c) states may impose their own labeling requirements in registering pesticides for special local needs. There is no basis for concluding that, in delineating the ongoing authority of the state agencies, Congress had any intent to eliminate any common law damages remedies.

CONCLUSION

The judgment of the court of appeals should be reversed.

[68] *See* House Comm. Report at 16 ("With regard to this Federal preemption of labeling and packaging, EPA may, where appropriate, in setting labeling and packaging requirements, give consideration to regional, State, and local needs.").

Respectfully submitted,

DAVID T. GOLDBERG
99 Hudson St., 8th Fl.
New York, N.Y. 10013
(212) 334-8813

SEAN H. DONAHUE
Counsel of Record
1477 A St., N.E.
Washington D.C. 20002
(202) 277-7085

Counsel for Amici Curiae

September 2004

03-388

Lodging submitted:

November 29, 2004

Material unavailable for filming